Supreme Court, U.S.
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No. 96-712

In The

Supreme Court of the United States

October Term, 1996

JOHN KAYE, Individually, and in his capacity as Monmouth County Prosecutor; THE COUNTY PROSECUTOR'S OFFICE OF THE COUNTY OF MONMOUTH; JOHN DOES 1-100; JANE DOES 1-100

THE COUNTY OF MONMOUTH,
Intervenor in District Court,

Petitioners,

v.

BARBARA COLEMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

RESPONSE TO CORRECTIONS OF MISSTATEMENTS IN THE PETITION 1

POINT I

The Respondent Fails to Address the Constitutional Implications of Accessing Punitive Damages Against an Entity Which has no Control Over the Person Responsible for Those Damages 3

POINT II

This Court Should Grant this Petition Because the United States Court of Appeals Completely Disregards the Holding of the States's Highest Court on an Issue of State Law 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES CITED

Brannon v. Holt, 469 U.S. 464 (1985) 2

Drake v. City of Rochester, 96 Misc. 2d 86; 408 N.Y.S. 2d 847 (N.Y.S. Ct. 1978) 6

Freeman v. Fairman, 916 F. Supp. 786 (N.D. Ill. 1996) 5

Holda v. County of Kane, 89 Ill. App. 3d 522; 410 N.E. 2d 522 (Ill. App. 1980) 4

Lehmann v. Toy's 'R' Us, 132 N.J. 587; 626 A.2d 445 (1993) 5, 6, 7, 8

Monell v. New York Department of Social Services, 436 U.S. 653 (1978) 2

STATUTES CITED

N.J.S.A. 2A:157-2 8

N.J.S.A. 2A:157-10 8

N.J.S.A. 2A:158-1 *et seq*..... 2

N.J.S.A. 2A:158-15 8

N.J.S.A. 2A:158-18.1 8

PUBLICATIONS CITED

Restatement (2d) of Agency § 219..... 7

RESPONSE TO THE CORRECTIONS OF MISSTATEMENTS IN THE PETITION.

Despite the fact that the United States District court for the District of New Jersey found as a fact that the county of Monmouth was never served with the complaint; was never a party to the lawsuit; never participated in the lawsuit; and was never given an opportunity to be heard, the respondent asserts that the County participated in the litigation. That the county of Monmouth was never listed on the docket of the United States court for the District of New Jersey remains uncontroverted. The County of Monmouth never received any notices from the court, nor was it invited to participate in the trial. Assertions to the contrary are simply incorrect.

Furthermore, the respondent continues to argue to this Court that the County of Monmouth agreed to have its liability submitted to the jury. That is simply not so. Counsel for John Kaye was the only person who tried the case and who tried it on behalf of Prosecutor Kaye alone. Counsel for Prosecutor Kaye and counsel for the plaintiff both crafted the charge in the District court. However, counsel for Kaye did not represent the interests of the County of Monmouth.

Additionally, the award of punitive damages against the County of Monmouth was challenged as a whole in the District court, in the Court of appeals and in the Petition for Rehearing. The respondent's assertion that it was not raised ignores the language in all the briefs filed in this action. In fact, the very basis of the District Court's opinion was that there could be no award of damages

against the County because the County did not control Prosecutor Kaye.

The respondent admits that the County of Monmouth was never served with a copy of the summons and complaint, arguing only that John Kaye was served, individually and in his capacity as the Monmouth County Prosecutor, and that he accepted service on behalf of the Monmouth County Prosecutor's Office (MCPO). The MCPO is not an agency or department of the Monmouth County government. As noted by this Court in *Brannon v. Holt*, 469 U.S. 464, 472 (1985), and *Monell v. New York City Department of Social Service*, 436 U.S. 653 (1978), service upon a government official is only effective to bind the entity if the department has no greater separate identity from the political subdivision upon which liability is sought.

The factual pillar upon which the District Court's decision rested was that the prosecutor and his office are separate entities from the County of Monmouth. Such a distinction was readily apparent from the proofs presented to the District Court. The prosecutor and his office are creations of New Jersey state statutes. N.J.S.A. 2A:158-1 *et seq.* The prosecutor's office cannot be created, abolished or in any way altered by the County of Monmouth. The County of Monmouth may not hire, fire, promote or demote any of the prosecutors, assistant prosecutors or his investigators or detectives. The office is not bound by any policies adopted by the County of Monmouth nor is the County of Monmouth bound by any policies adopted by the office. Therefore, there exists a separation between the Prosecutor's Office and the County of Monmouth and service upon the Prosecutor's

Office cannot constitute service upon the County of Monmouth. An even more fundamental distinction is that the County of Monmouth was never named in the lawsuit. It was never a party to the lawsuit, it never participated in the lawsuit and it never had an opportunity to be heard in the lawsuit.

POINT I

THE RESPONDENT FAILS TO ADDRESS THE CONSTITUTIONAL IMPLICATIONS OF ASSESSING PUNITIVE DAMAGES AGAINST AN ENTITY THAT HAS NO CONTROL OVER THE ACT OR THE PERSON RESPONSIBLE FOR THOSE DAMAGES

The response to the petition completely ignores the assertion that it violates basic constitutional due process principles to impose liability upon an entity for the actions of an individual over whom it has no control. The Court of Appeals in its opinion clearly and equivocally stated that the County of Monmouth has no control over the action of Prosecutor Kaye, yet ruled that it must be liable for those actions, even when those actions allegedly serve as a basis for punitive damages. There could be no concept more foreign to this Court's notions of due process and fair play. The County of Monmouth cannot in any way control the action's of the Prosecutor which were complained of in this action. It cannot hire, fire, promote or demote any assistant prosecutor or any of the prosecutors or investigators. The response filed by the respondents completely and utterly ignore this point. The purpose of punitive damages is to punish conduct and to deter that type of conduct in the future. The imposition of

punitive damages upon the County of Monmouth for the actions of Prosecutor Kaye serves none of these purposes.

The Respondent has not advanced any arguments in support of the proposition that a governmental entity is liable for punitive damages as a result of the actions of a person over whom the governmental entity exercises no control. Rather, the respondent attempts to cloud the issues by continually referring to a "fact specific" determination by the Court of Appeals that the County of Monmouth was a party to the action and consented to the court's jurisdiction. Aside from the question of whether or not the County was a party to the action, the decision cannot stand.

Even assuming, *arguendo,* that the County waived any jurisdictional objections and was properly a party to the litigation, it does not follow that a governmental entity can be held liable for punitive damages where the entity has absolutely no control over the individual whose conduct forms the basis of the plaintiff's complaint.

The respondent cites two cases in her brief for the proposition that political subdivisions may be liable for the actions of independent constitutional officers even without the ability to control those officers. Both of these cases are readily distinguishable from the present case. The first case, *Holda v. County of Kane,* 89, Ill.App. 3d 522, 410 N.E.2d 552 (Ill. App. 1980), is clearly distinguishable. There were no constitutional due process issues raised in *Holda.* Therefore, the case is inapplicable to this Court's analysis.

A more appropriate citation for this Court's purposes would have been *Freeman v. Fairman*, 916 F. Supp. 786 (N.D. Ill. 1996). In that case, the United States District Court for the Northern District of Illinois clearly enunciated a far more equitable and, it is submitted, persuasive analysis for the purposes herein. The *Freeman* case involved a prisoner who was mistakenly given an overdose of medication at the Cook County Department of Corrections where he subsequently died. Suit was brought against the Cook County Department of Corrections and Cook County. In holding that Cook County could not be responsible for the Department of Corrections, the court noted that

> Under Illinois law, the County has no authority to set policy for the County Department of Corrections (CCDOC) or direct the actions of CCDOC employees. The 7th Circuit has found that "the Cook County Jail and the Cook County Department of Corrections are solely under the supervision and control of the Sheriff of Cook County." (citations omitted) The Cook County Sheriff is an "independently elected constitutional officer who answers only to the elector and not to the Cook County Board of Commissioners."

Freeman, 916 F. Supp. at 789.

Consequently, respondent's assertion that Illinois law and Illinois courts have routinely imposed damages on officers over whom political subdivisions have no control, is without merit. And, more to the point, the law in New Jersey is expressly to the contrary. In *Lehmann v. Toys 'R' Us*, the New Jersey Supreme Court held that in order for punitive and compensatory damages to be

assessed against an employer, the employer must be able to control the employee whose conduct is complained of. *Lehmann*, 132 N.J. 587, 626 A. 2d 445, 460 (1993). That is exactly the opposite of the case here.

Additionally, the citation to *Drake v. City of Rochester*, 96 Misc. 2d 86, 408 N.Y.S. 2d 847 (N.Y.S. Ct. 1978), is similarly distinguishable. In the State of New York, district attorneys are elected officials. Should some event occur during a district attorney's tenure which is unacceptable in its nature, the electorate is free to vote that person out of office. In this case, the County Prosecutors in the State of New Jersey are appointed by the Governor with the advice and consent of the Senate for a term of five (5) years. They cannot be removed by the electorate nor can they be removed by the County Board of Chosen Freeholders.

Given these facts, acknowledged by the United States Court of Appeals for the Third Circuit, what happened below amounts to an *ex parte* judicial determination that a body politic is liable for an individual for both punitive and compensatory damages simply by virtue of that individual's geographic location.

It is telling that the only argument the respondent is able to muster in support of the contention that the County should be liable for the actions of the Prosecutor is a quote from a newspaper article. Comments by Mr. Carton in a newspaper article are completely irrelevant to the issues before this Court. The respondent fails to address this crucial aspect of the decision of the Third Circuit. That decision violates the due process right to the County of Monmouth because it punishes one person for

the acts of another person for whom it has no control. The respondent's brief completely fails to touch upon this key and vital constitutional interest of the County of Monmouth. Consequently, there is a substantial fundamental constitutional wrong which needs to be addressed by this court.

POINT II

THIS COURT SHOULD GRANT THIS PETITION BECAUSE THE UNITED STATES COURT OF APPEALS COMPLETELY DISREGARDS THE HOLDING OF THE STATE'S HIGHEST COURT ON AN ISSUE OF STATE LAW

The Court of Appeals correctly stated the principles established in *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 626 A. 2d 445 (N.J. 1933); furthermore, it freely acknowledged that the plaintiff could not have legally met that burden in order to prove employer liability on behalf of the County of Monmouth. Despite that fact, the Court of Appeals ignored the holding of the highest court of a state on a question of state law, and fashioned its own remedy based upon nothing more than conjecture.

In its landmark decision in *Lehmann*, the Supreme Court of New Jersey established a scope of an employer's liability for sexual harassment of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1, *et seq.*, and held that with respect to employer or supervisory liability, strict liability only applies for relief that is equitable in nature. *Lehmann*, 132 at 617, 626 A. 2d at 460. Before an employer can be held liable for compensatory damages, the Restatement (2d) of Agency § 219 tests for a liability of a master of a torts of a servant must be

satisfied. *Lehmann*, 132 N.J. at 618, 626 A. 2d at 461. Finally, *Lehmann* held that punitive damage may be imposed only "when a wrongdoers conduct is especially egregious" specifically, where the conduct was "authorized, participated in, or ratified by the employer." *Lehmann*, 132 N.J. at 624, 626 A. 2d at 464 (citations omitted).

The United States Court of Appeals correctly recognized that under new Jersey law, the County of Monmouth has absolutely no ability to control or effect in any way Kaye's employment decisions. Citing N.J.S.A. Sections 2A:157-2; 2A:157-10; 2A:158-15; 2A:158-18.1. Accordingly, the Court of Appeals recognized that under *Lehmann* the plaintiff could never have proven the County legally responsible for Prosecutor Kaye's acts. Such proofs would have been legally impossible. Apparently dissatisfied with that result, the panel took it upon itself to simply disregard *Lehmann* altogether in favor of a different test. There was a black letter test established in a landmark decision by a state's highest court. When the United States Court of Appeals for the Third Circuit found that the plaintiffs could never have legally met that test, the Third Circuit abandoned the test established by the New Jersey Supreme Court and adopted a new one based upon its own conjecture and guesswork. A more result driven decision is difficult to imagine. With its decision, the Court of Appeals improperly disregarded longstanding doctrines of federalism. Consequently, this court must invoke its jurisdiction to consider such a flagrant violation of the principles established by *Erie*.

CONCLUSION

The petition before the Court raises serious, substantial and important issues which justify the Court's review. The United States Court of Appeals for the Third Circuit committed substantial constitutional errors in its opinion. By allowing the imposition of punitive damages against an entity which has no control over an individual, the United States Court of Appeals for the Third Circuit wandered far afield from this Court's precedents. Additionally, by violating the principles of *Erie*, the Court of Appeals has worked a substantial injustice on the County of Monmouth and has set a dangerous constitutional precedent for counties throughout the State of New Jersey. Consequently, the decision of the United States Court of Appeals for the Third Circuit is constitutionally flawed and presents substantial issues and significant justification for this Court's granting of the petition.

Based upon the foregoing, it is respectfully submitted that the petition should be granted.

Respectfully submitted,

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